

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)

**FURTHER NOTICE OF PROPOSED
RULE MAKING**)

**Amendment of Part 90 of the
Commission's Rules to Facilitate
Future Development of SMR Systems
in the 800 MHz Frequency Band**)

**PR Docket No. 93-144
RM-8117, RM-8030
RM-8029**

and

**Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding
800 MHz SMR**)

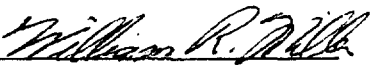
PP Docket No. 93-253

To the Commission:

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**COMMENTS OF
RUSS MILLER RENTAL**

Respectfully submitted,
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dba, Russ Miller Rental

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Date: January 9, 1995

I. INTRODUCTION

1. Russ Miller Rental is a small SMR operator in the Dallas/Fort Worth, Texas market. It operates nine 800 MHz channels in Fort Worth, five in Sherman, five in Bowie, five in Stephenville, one in Peoria and one in Mineral Wells, Texas. We have been in the two-way radio business since 1972 and the SMR business since 1984. We are members of AMTA, PCIA and SMR WON. Mr. Miller is a member of the Radio Club of America and is active in several industry trade association committees, including AMTA's Regulatory Committee, Small Business Operator's Council, and Future Planning Committee.

II. GENERAL

2. Russ Miller Rental has reviewed the FNPR in detail and has met with industry trade associations and other SMR operators, both large and small, in an effort to address the issues covered by the FNPR.

III. SUMMARY

3. The Commission's stated primary goal is to "... establish a flexible regulatory scheme for the 800 MHz SMR service that will allow for more efficient licensing, eliminate unnecessary regulatory burdens on both existing and future licensees, and thereby enhance the competitive potential of SMR services in the mobile services marketplace. ... ensure that we grant licenses to those that value the spectrum most highly and will maximize its use to provide the best quality and variety of service to consumers."¹

¹FNPR, ¶ 2, Goals of the Commission

4. We believe that these goals, along with the rest of the Commission's goals are admirable. We also believe that the resultant proposed rules are being applied to an industry that does not feel a pressing need to have its rules changed. In fact we believe that there is only one company within our industry which would like to see the rules changed as proposed, as it is the only one who will benefit from most of the changes. The rest of us, "the silent majority", will actually be economically harmed by the impact of many of these new rules.

5. The current SMR industry is a mature industry in its present analog mode, with full utilization of spectrum throughout all urban areas of the country and heavy utilization in rural areas. The few operators who operate in the digital (ESMR) mode are not mature, but are at a critical embryonic phase of their development. These few ESMR operators would like to see an industry which is tailored by regulations to fit their operating plans, regardless of the consequences suffered by the rest of the operators. In other words, it is the few large operators, who have access to large sums of capital, against the many small operators, who do not. The small analog operators are struggling to remain viable in the face of the proposed changes, and under the Commission's proposed rules, they will not be able to successfully bid for their current or additional spectrum under any circumstances.

6. It is the small analog operators who have built the SMR industry, piece by piece, into what it is today. The consolidators have simply acquired many of the small operators and grouped the discrete systems into "super-systems". To change the rules to make contiguous spectrum available for the consolidators is not justified. The consolidators themselves admit that the need for contiguous spectrum is based upon a proposed technology which is not even developed yet and will not be used for 5 to 7 years.

7. The SMR spectrum was designed and allocated as dispatch spectrum and in fact, telephone interconnect was prohibited on it for years. The prospective PCS providers as well as the current cellular providers both have spectrum which was conceived and expressly allocated for high capacity mobile telephony operations. To attempt to now redesign the SMR spectrum for high capacity cellular telephone type usage is not in the best interests of the majority of the SMR operators, and will cause most of the smaller operators like us major economic harm. SMR has traditionally been a low cost "blue collar" service provider, whereas both cellular and PCS are higher cost "white collar" providers. There is nothing the Commission can do to re-allocate and auction frequencies to create a high capacity SMR mobile telephone system that can equal the low cost service provided by traditional SMRs, as by default the winners of the auctioned frequencies must pass their costs on to the consumer. In light of the foregoing, we believe that the SMR industry does not need rules which are "to the fullest extent possible, comparable to the rules governing competing CMRS providers."² SMRs, although technically competitive to the other services, are still very different in that they operate on mature spectrum that is already heavily occupied by a very diverse group of licensees who utilize many different types of systems and technologies, and provide service to an entirely different class of consumer at a much lower cost than either cellular or PCS.

8. We are respectfully offering alternatives to the Commission's proposed rules which we feel will be more suitable to the industry as a whole and still allow successful operations by both digital ESMR and analog operators, as well as benefits to the consumer. While our proposals may not be so broad and sweeping as the Commission's, and certainly not as captivating for Wall Street and the ESMR operators, we feel that our proposals are much more economically sound and will be more than

²FNPR, ¶ 2, Goals of the Commission

adequate to allow the SMR industry (both wide-area digital and local or wide-area analog) to progress as technology allows and to continue to prosper in the future.

IV. DISCUSSION

A. WIDE-AREA LICENSING

9. The Commission has proposed³ that channels 401 - 600 be auctioned in four contiguous blocks of 50 channels for each MTA based service area. We believe that MTA based service areas are too large for effective economic operation of SMR systems. Much of the SMR spectrum in rural areas will not be used, just as many of the assigned cellular channels are not used in the same areas, as there is a lack of demand from the sparse population. These SMR channels will still be tied up by the wide area licensee(s) and therefore not available for use by others whom may have a need for them. There are a significant number of existing local operators in rural areas that have a limited need to grow and expand their systems, either geographically or in capacity. The timing of these operators' needs to expand has unfortunately coincided with that of this NPRM.

10. The few large ESMRs already control virtually all of the channels in the urban areas. This includes most, if not all, of the channels between 401 and 600 as well as the lower 80 SMR channels and the General and Inter-category channels. These same ESMRs have filed applications for, and have received many grants on the same channels for wide area systems which extend into the rural areas between urban areas, and in many cases, close the gap between urban areas.

11. The 800 MHz SMR spectrum is already so heavily utilized that co-channel protection at the boundaries of the Commission defined service areas will require relocation of many existing stations that are located close to the boundaries of these areas.

³FNPR, ¶¶ 15-17

This could have a detrimental effect on existing communications of consumers (especially those with hand-held radios) who operate in an area bordering two MTAs (or other type of artificially designated) areas. Many consumers would find themselves operating on systems owned by several different SMRs, where the consumer operating area crosses MTA boundaries. These consumers will have to either subscribe to several SMRs or pay higher roaming rates. It would also have a negative economic impact on those tower owners who have tower sites in the MTA border areas. Most tower sites and resultant SMR station locations were chosen in response to **consumer demand** for service in a given **consumer defined geographic area**.

12. Instead of the Commission's proposal for MTA sized areas, we propose that licensees continue to develop their own self-defined service areas (through acquisition of others or by applying for additional channels where available), **based upon the service requirements of their customers**, and their own needs and marketing plans. This would result in no disruption to existing consumers and tower owners and would allow service to be provided in a naturally occurring trading area, instead of an artificial one created based upon a study.

13. We have had direct discussions with Nextel's Senior Vice President of Government Affairs, Mr. Robert S. Foosaner. In those discussions he stated that Nextel had not asked for contiguous spectrum or for 200 channels in its initial requests to the Commission for approval of the wide area ESMR concept, and that the Motorola MIRS technology currently being utilized by Nextel did not require such accommodations. He stated that the reason for which Nextel was now asking for 200 contiguous channels and mandatory migration of incumbent licensees on those channels, was to allow for implementation of future technologies, such as spread spectrum, in 5 to 7 years. PCS and cellular both have contiguous spectrum and Nextel feels it is entitled to the same

considerations (minimum of one block of 200 channels) in order to effectively compete with cellular and PCS in the future.

B. SITE SPECIFIC LICENSING

14. We also propose that there be no designated channel blocks and subsequent auctions of those blocks. Instead, each SMR licensee would keep the discrete channels they are already licensed for on a site-by-site basis. Licensees would be free to continue to acquire additional channels from other operators, or trade channels among operators to obtain contiguous spectrum as is currently allowed in 90.645(g), but with no limit on the number of contiguous frequencies. The elimination of auctions would allow the smaller SMRs to not only continue to operate, but to expand somewhat using those channels that might be available.

15. In order to eliminate the burden of site specific licensing on both the Commission and the existing licensees of wide-area systems, the Commission could allow the use of fill-in type sites and relocation of existing sites within protected service areas⁴ with simple notification to the Commission where the site is in the interior of the licensee's footprint for the frequencies involved or will not extend the licensee's 22 dBu contour of the existing station. In addition, we propose that the Commission allow SMRs who have established a contiguous footprint of contiguous or non-contiguous frequencies to apply for their own service area based licenses on those frequencies. This service area designation could be based upon whatever the licensee chooses to use such as counties, states, BTAs, MTAs, or any other readily identifiable area.

⁴FNPR, ¶ 40

C. SPECULATION

16. To deter speculation, we propose that future eligibility for SMR spectrum be limited to existing SMR licensees who are operating constructed stations in the same area (within 35 miles of an existing station licensed to the same licensee). This eligibility limitation is very similar to policies governing the current SMR waiting lists, which give a preference to licensees expanding their systems, and the allocation of the cellular reserve band frequencies only to existing cellular licensees. It also closely follows the current rules for trunked SMR use of General Category and Industrial/Land Transportation frequencies where they can only be used for expansion of existing SMR systems where no SMR category frequencies are available. The geographic restrictions mirror those currently used to establish footprints for wide area filings. Given the limited number of 800 MHz. frequencies that are available anywhere in the country, all unassigned frequencies could be considered reserve band frequencies for expansion of existing SMR systems and existing SMR footprints only. This policy would not prohibit any new entrants from obtaining SMR spectrum, as a new entrant would only need to acquire an incumbent licensee to establish eligibility. Once eligible, a new entity would then be free to apply for additional spectrum. This would allow entry to wireline carriers and all other interested parties. These restrictions would only affect the small number of available frequencies left as the rest of the frequencies are already licensed. We propose no limit on the number of channels applied for, as long as all of the channels are part of the licensee's constructed adjacent footprint. We do propose a limit of 5 channels at a time, per location, not per area, if the frequencies applied for are not already licensed to the applicant within the licensee's existing footprint. The licensee would be eligible for additional channels as soon as all licensed frequencies were constructed and operational. We propose that this limit of 5 channels at a time apply to any of the SMR, General Category or inter-service shared frequencies.

17. The occurrence of mutually exclusive applications would be reduced by the limitation of eligibility to incumbent licensees wishing to expand either the capacity of their existing systems or their existing footprint. As a result, first-come-first-serve procedures could be used to resolve most mutually exclusive applications, with lotteries used only to resolve applications received on the same day.

18. The rules and policies proposed above will work for existing wide area and local licensees. Both wide-area and local licensees will not be impeded from constructing or expanding their systems and both will be treated alike, with the same rights to relocate or expand their systems. If wide-area licensees feel that they need contiguous spectrum, they can either continue to acquire frequencies from other licensees or trade frequencies with other licensees in order to accomplish their goals.

19. Contiguous spectrum will not be needed for a number of years, as the systems that require contiguous spectrum to operate will be second generation systems which will replace the MIRS equipment currently being installed. Nextel's scenario of a single licensee in any given area who may "hold out" and prevent the implementation of the spread spectrum technology in a given area is not valid. In the event an existing licensee is "in the way" of a spread spectrum system and refuses to be acquired or change to other frequencies, the cell site transmitter of the spread spectrum system can transmit information to its subscriber units instructing them to simply skip over the offending frequencies. A similar feature is found in some current analog trunking systems, in that channel information for allowed channels is transmitted to subscriber units by the particular system's (cell's) control channel.

20. The existing 280 SMR channels, the 150 General Category channels, the 50 Business Category channels, the 50 Industrial/Land Transportation Category channels,

and the 70 Public Safety Category channels should all retain their current allocation and inter-category sharing provisions as provided in 90.621(g). This will allow SMR systems to expand as needed, yet still provide some frequencies for those entities that require their own private systems. In most of the urban areas all of these frequencies are currently assigned and in use, mostly by SMRs. Many of these frequencies were originally assigned to eligibles other than SMRs. However, since use of these frequencies for expansion of SMR trunking systems has been allowed, there has been a change in the use of these frequencies from private conventional configurations to trunked SMR use. The application of trunking technology to these frequencies has resulted in much more efficient utilization of spectrum that previously had very little use, yet was encumbered. Needs for private systems could be met by 900 MHz channels, 220 MHz channels or re-farmed frequencies below 800 MHz.

21. The demise of the rules for system loading and 40 mile separation of unloaded systems reflect the maturity of the industry and are much more applicable to today's marketplace.

V. MTA SERVICE AREAS

22. The Commission proposes MTA based service area licenses for channels 401 - 600 in four 50 channel blocks. We believe that MTA based service areas are too large to allow effective operations of SMR systems. Due to the high cost of the MIRS infrastructure, ESMRs will concentrate on urban systems with little focus in rural areas, except along major traffic arteries. This will result in a lack of service to rural America, with channels still tied up by the MTA licensee. If the Commission should decide to proceed with MTA based licenses, then there should be safeguards to prevent ESMR operators from providing service only in the most profitable areas. There should be benchmark construction requirements of a percentage of the population in both urban and

rural areas, which is tied to a percentage of the geographical area and percentage of the channels utilized in each. Failure to meet any of these requirements should trigger a channel take-back mechanism. There should also be a some type of provision for an MTA license winner who can not provide service in an urban or rural area within its MTA due to another ESMR operator controlling most or all of the channels in that area. Perhaps only incumbent licensees in the target MTA should be allowed to bid, but this would not eliminate all of the above problems. We favor the use of 50 channel blocks, as it will give other operators in the MTA an opportunity to bid. However, 50 channels is probably not enough to establish a high capacity type of system to compete with cellular and PCS.

23. We also see a service void developing along the borders of MTAs as the MTA licensee will be required to control the signal level broadcast into the adjacent MTA, unless, of course, the same licensee is the winning bidder for both MTAs. This same service void now exists in the cellular service. In many areas along the border of a RSA and MSA the signal is weak and unreliable. In fact, depending upon propagation conditions at any given time, a cellular subscriber can end up on a system other than his "home" system and be required to pay roaming and long distance charges.

VI. LOCAL LICENSING

24. The Commission has proposed that the lower 80 SMR channels be licensed on a site-by site basis for local operators, that wide-area systems be allowed on these frequencies, and licensees allowed to trade channels among themselves to create contiguous frequencies in the upper channels. We believe that dividing the channels into contiguous, non-contiguous, and local and wide area designations will create a lower or second class of licensee, as the lower frequencies will not retain their value as will the upper frequencies. We also feel that the lower frequencies, by their very nature of being non-contiguous, will create a long term competitive disadvantage for the licensees on

those frequencies. If the upper frequencies are contiguous, the equipment for those frequencies will be able to be produced more cheaply as it will not have to meet any emission mask requirements, except at the edges of the band, and adjacent channel rejection requirements for the receivers can be less stringent, as the same licensee will control the location of the adjacent channel transmitters.

25. As an alternative to site-specific local licensing the Commission requests comments regarding licensing BTA service areas for local licenses. We do not support the use of BTAs, BEAs or any other type of artificial area for local (or wide-area) licensing. We realize that area specific licensing poses less of an administrative burden on the Commission. However, while the Commission does need to be consider its resources when proposing new rules, the administrative burden of site specific licensing should not dictate that the Commission take the easy way out. The Commission's role is that of a public servant and it should be responsive to the needs of the public. The Commission has always (except for cellular) performed site specific licensing in the past and it has not been a burden until more and more licensing responsibilities were shifted to the Gettysburg staff. When coupled with the Commission's hiring freeze, the demise of the 30 year old licensing computer, and the influx of wide area and speculative license applications, the result has been the current backlog of SMR applications.

26. In order to ensure that its rules do not inadvertently allow MTA licensees to acquire large numbers of non-MTA channels primarily intended for local use, the Commission proposes a limit on the number of non-MTA channels that an applicant can obtain at one time in an area (defined as local licensing area such as BTA) without constructing and commencing operations, to 5 channels and requiring a 12 month construction period for local channels. We believe that this limitation is too restrictive as a 5 channel limit over a BTA sized area is too few for such a large area. This is nothing

more than the 40 mile rule expanded. The channels in the urban areas are all already assigned and mostly controlled by the ESMR operators, whom would presumably be the MTA licensees. Only unassigned channels in rural areas would be affected by this restriction. We believe that this restriction would also limit the number of channels a local operator could obtain and would serve to limit the local operators.

27. If the Commission should decide to license systems based upon geographic areas with auctions, then individual licensees should be allowed to band together to bid on the area as a whole, but operate independently of each other. There should be no restrictions on the transfer of the resulting partial geographic area licenses.

VII. MANDATORY MIGRATION

28. Incumbent licensees on the upper 200 channels that the FCC is proposing be licensed on an MTA basis should be protected on their existing frequencies, not forced to relocate to other channels, whether their expenses are paid for or not. Most incumbent licensees on the upper 200 channels are in rural areas where capacity is not an issue. Those in the urban areas have already been acquired. The FCC should not be the savior of the potential block licensees by regulating incumbent licensees be relocated to other frequencies. If a consolidator wants these frequencies, than the consolidator should have to buy out the existing licensees or pay for them to relocate on a voluntary basis only. No one should be forced to relocate.

29. Most incumbent licensees have a large, installed customer base in place and relocation would harm the customers as much, if not more than the licensee, as the customer would be at the very least, inconvenienced, and would lose productive time as well as have to pay its own employees while "re-tuning" is taking place. Most rural area customers are fundamentally different from those in urban areas. The rural area user

generally travels over a much wider area, much more frequently than an urban customer. This is because there are fewer "one stop shopping" places in rural areas and the customers in those areas must constantly travel about in order to procure the goods and services that they ordinarily need on a daily basis. In addition, most rural area systems are heavily interconnected and the customers roam to other systems over the rural area in which they regularly travel. Coordinating the re-programming of these customers on multiple systems, some of which may require earlier re-tuning than others, would be most inconvenient to the customer and would require multiple re-programming events, per customer, in order to get all systems the customer uses re-programmed.

VIII. COMPETITIVE BIDDING

30. We do not believe auctions should be used to allocate spectrum to licensees in the SMR service. Auctions will increase the cost of service to consumers as the cost must be passed on. Auctions will also limit the participation of the small SMRs, even with incentives. Most small SMRs normally have to go to the bank to borrow money to construct a single channel. Banks will not loan money for which to bid for frequencies at auction and there is no other way for a small SMR to obtain the funds required, other than to give up control of his company.

31. If the Commission should decide to use auctions, then simultaneous multi-round auctions should be used for both local and wide area frequencies. Sealed bids, while easier to administrate for local channels, do not leave any margin for valuation of frequencies. As SMR frequencies have never been auctioned, we believe that most bidders would not have any idea of how much to bid

32. Small SMRs should be considered designated entities. Rural Telephone companies should not receive any special considerations as they can use part of their

existing infrastructure to implement their systems. Rural telephone companies also receive assistance from the REA.

33. There is no need for an Entrepreneur's Block as the 800 MHz band is already so heavily licensed, that it makes no sense to have new entrants bid for frequencies.

IX. STATION RELOCATION

34. Incumbent licensees on the 800 MHz. channels should be able to move their stations for business reasons; i.e. loss of site, so long as the incumbent maintains approximately the same 22 dBu contour (minor excursions should be allowed as long as they do not cause interference with the block licensee). In cases where the block licensee controls the tower site of the incumbent and the move is required as a result of the block licensee exercising control over the site, then the 22 dBu contour requirement should not apply and the block licensee should be required to accept any interference created as a result of the incumbent's move. The current 2 km rule causing treatment as an initial application is too restrictive. Relocation should be considered as a minor modification as long as the 22 dBu contour of the station remains substantially the same.

X. OTHER MATTERS

35. If the Commission should decide to re-allocate the upper 200 channels as contiguous spectrum, either as 1 block or 4, then there should be some provision to do the same on the lower 80 channels, or they will become second class spectrum. Ideally, if the Commission decides to allocate contiguous spectrum, it should re-allocate the entire 800 MHz band, including moving both sections of public safety spectrum to the lower end of

the band and make all SMR channels contiguous, as well as adjacent to cellular. This would provide the most efficient use of the spectrum